Pavilion Yields Sdn Bhd v Universal Trustee (M) Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NCVC-1476–09 OF 2015
NANTHA BALAN J
8 APRIL 2016

Trusts and Trustees — Trust deed — Construction of trust deed — Issuer of redeemable convertible secured notes defaulted and failed to redeem notes by maturity date — Noteholders pursuant to trust deed passed ordinary resolution ('enforcement resolution') directing trustee to declare an event of default and realise charged securities — Majority of noteholders aligned to notes issuer and who were unable to muster enough votes to pass special resolution sought to revoke enforcement resolution by way of ordinary resolution — Trustee and remaining noteholders opposed move saying revocation could only be done by way of special resolution — Whether provisions in trust deed showed special resolution was required — Whether trustee's powers, functions and discretion to deal in speedy, transparent and fair manner with charged securities for benefit of all noteholders would be threatened if ordinary resolution proposed by majority noteholders was allowed

Apart from the first defendant ('the trustee'), the other parties to the instant originating summons ('the OS') were holders of redeemable convertible secured notes ('the notes') issued by Gula Perak Bhd ('GPB'). The plaintiff and the seventh and eighth defendants (hereafter collectively referred to as 'the Tan Sri Lim Group') held the majority (50.25%) of the notes while the second to the sixth defendants ('the banks') collectively held 48.54% of the notes. The trustee, appointed under a trust deed to safeguard the interests of all the noteholders, held several land ('the charged land') that were charged to it by GPB and its subsidiaries as security for the payment of the notes. When GPB defaulted in payment and failed to redeem the notes by the maturity date, the noteholders by an ordinary resolution ('the EOD resolution') pursuant to cl 14.2 of the trust deed directed the trustee to declare that an event of default had occurred requiring GBP to immediately pay the full nominal value of the notes failing which the trustee was to take prompt action to realise the charged land. The trustee obtained court orders to sell the charged land at various reserve prices but in at least two instances, public auctions of the charged land had to be called off due to absence of bidders. The Tan Sri Lim Group, which was aligned to GBP, wanted to stop the trustee's enforcement action but the trust deed was silent on how the EOD resolution could be revoked. The trustee, in exercise of its power under cl 22.1(c) of the trust deed to make decisions regarding all questions and doubts under the deed that were conclusive and binding on the noteholders, insisted that a special resolution was required to revoke the EOD resolution. This view was adopted by the

banks. The Tan Sri Lim Group could not muster the support of 75% of the noteholders required to pass a special resolution. An ordinary resolution only required the support of more than 50% of the noteholders. The Tan Sri Lim Group took the view that an ordinary resolution was sufficient to revoke the EOD resolution and filed the instant OS to seek declarations ('the proposed resolutions') that an ordinary resolution was sufficient to, inter alia, direct the trustee to halt all enforcement action against the charged land ('the resolution to discontinue enforcement'), fix a higher valuation for them ('the higher valuation resolution') and to sell or otherwise dispose of the charged land ('the asset disposal resolution'). The trustee and the banks argued that as the proposed resolutions, in effect, sought to modify or abrogate existing provisions of the trust deed, especially cll 22.1(c), 14.3 and 14.5, such modification or abrogation could only be done by way of a special resolution under cl 17(e) of Schedule 3 of the trust deed. The banks argued that the proposed resolutions were an attempt by the Tan Sri Lim Group to usurp the trustee's power of determination, entitlement and discretion under the trust deed to take such measures as were necessary to expeditiously realise the charged land and protect the interests of the noteholders. The banks, accordingly, filed a counterclaim to declare that a special resolution was necessary for the proposed resolutions to be carried.

Held, dismissing the OS and allowing the counterclaim:

(1) The proposed resolutions were patently and plainly a revocation of the EOD resolution. They effectively emasculated the trustee of its power and discretion to take recovery action pursuant to cll 14.3 and 14.5 of the trust deed. If the proposed resolutions were granted, all power and discretion vested in the trustee under those clauses would be rendered illusory and such power and discretion would be transferred into the hands of those who held 50.25% of the notes to the utter prejudice of the banks (which held 48.5%) and the public spread (1.2083%). The proposed resolutions were far-reaching and draconian vis a vis the rights of the noteholders and the fate of the charged land. As such, the trustee was entitled to insist that the proposed resolutions be passed by way of special resolution (see paras 116–117 & 133).

(2) The proposed resolutions would scuttle all recovery/enforcement efforts by the trustee, result in an abrogation or modification of the rights/interests of the noteholders and substantially encroach upon and/or emasculate the powers/discretion of the trustee and effectively relegate all such power/discretion to the hands of the Tan Sri Lim Group which, depending on what their ultimate plan was, would or might result in no recovery and/or enforcement against GBP and/or its subsidiaries and/or against the charged land. This was par excellence a modification or abrogation of the terms of the trust deed and the rights of the noteholders (which would trigger cl 17(d) and/or (e) of Schedule 3 of the

trust deed) and as such the proposed resolutions could only be carried through by special resolution. Clause 22.1(c) of the trust deed empowered the trustee to determine 'all questions and doubts in relation to any provision' of the trust deed. The trustee had, with sufficient and cogent reasons and explanation, determined that the proposed resolutions should be passed by way of special resolution. That determination was conclusive and binding on all the noteholders. The complaint that the trustee could not have absolute and unfettered discretion was a non-starter because the trust deed itself gave such vast powers to the trustee to decide, as it thought fit, whether a matter, depending on its importance and impact on the rights and entitlement of the noteholders, ought to be done via special resolution (see paras 124 & 127–129).

(3) The plaintiff's higher valuation resolution which sought to impose a 'higher valuation' for the charged properties was illogical. Reserve prices, reflecting the market value, had already been fixed for the charged land by the court and even then, the auctions of two of those properties were aborted because there were no bidders. It was illogical to fix a higher valuation and to push up the reserve prices as that would further negate the possibility of enticing bidders to bid for the land. As for the asset disposal resolution, it grossly usurped the trustee's powers and function under the trust deed vis a vis enforcement and/or realisation of the charged land and placed it entirely in the hands of those who could muster enough votes for an ordinary resolution (more than 50%) but not a special resolution, which required 75% of the votes (see paras 119–121).

(4) It was significant that the plaintiff had previously issued a letter dated 28 October 2014 to the trustee proposing that a special resolution be passed for the sale of the Sepang Land via private treaty. That letter was a manifestation of an express acknowledgement that such disposal of assets must be undertaken via a special resolution. Thus, the plaintiff, and by extension the Tan Sri Lim Group, were estopped from now contending that the proposed resolutions might be undertaken via ordinary resolution. It was quite legitimate to examine the past conduct of the parties to determine how they had interpreted the terms of the trust deed. If parties had, by conduct, given a particular meaning to a term in a contract, then estoppel would apply to preclude them from contending to the contrary (see paras 122–123).

(5) Tan Sri Lim Group's argument that the Group's wishes in respect of the proposed resolutions could never prevail as they would not be able to muster 75% of the votes at any meeting of the noteholders to pass a special resolution was flawed as it ignored the fact that the rights, entitlements and interests of the noteholders ranked pari passu and each

A was no greater than the other. Merely because the Group collectively held 50.25% of the notes did not equate to them having 'majority rights' such that they could decide via ordinary resolution all matters relating to enforcement/realisation of the charged land. The trustee was appointed to act 'for the benefit of the holders', ie, all the noteholders and not just to
B act in favour of one side or the other. Indeed, any monies that were recovered or recouped would be distributed to all noteholders in proportion to the amount of notes they held (see paras 125–127).

[Bahasa Malaysia summary

C Selain daripada defendan pertama ('pemegang amanah'), pihak lain kepada saman pemula ini ('SP') merupakan pemegang nota bercagar boleh ditukar yang boleh ditebus ('nota-nota') yang dikeluarkan oleh Gula Perak Bhd ('GPB'). Pihak plaintif dan defendan ketujuh dan kelapan (selepas ini disebut secara kolektif sebagai 'Kumpulan Tan Sri Lim') memegang majoriti (50.25%)
D nota-nota itu manakala defendan kedua hingga keenam ('pihak bank') secara kolektifnya memegang 48.54% nota-nota itu. Pemegang amanah, yang dilantik di bawah suatu surat ikatan amanah untuk menjaga kepentingan kesemua pemegang nota-nota, memegang beberapa bidang tanah ('tanah yang dicagar') yang dicagar kepadanya oleh GPB dan anak syarikatnya sebagai
E cagaran bagi pembayaran nota-nota itu. Apabila pihak GPB tidak membuat pembayaran dan gagal untuk menebus nota-nota itu pada tarikh matangnya, pemegang nota-nota itu melalui resolusi biasa ('resolusi EOD') menurut klausa 14.2 surat ikatan amanah mengarahkan pihak pemegang amanah mengisytiharkan bahawa suatu keadaan kegagalan membuat pembayaran telah
F berlaku dan menghendaki GPB untuk membayar keseluruhan nilai nominal nota-nota itu serta-merta dan jika gagal, pihak pemegang amanah hendaklah mengambil tindakan segera untuk menghasilkan tanah yang dicagar itu. Pihak pemegang amanah telah mendapatkan perintah mahkamah untuk menjual tanah yang dicagar itu pada beberapa harga rizab tetapi sekurang-kurangnya
G dalam dua keadaan, lelongan awam tanah yang dicagar itu terpaksa dibatalkan kerana ketiadaan pembida. Kumpulan Tan Sri Lim, yang sepakat dengan GPB, hendak memberhentikan penguatkuasaan tindakan oleh pemegang amanah itu tetapi surat ikatan amanah tidak menyatakan bagaimana resolusi EOD itu dapat dibatalkan. Pihak pemegang amanah, dalam menjalankan kuasanya di
H bawah klausa 22.1(c) surat ikatan amanah itu untuk membuat keputusan berkenaan dengan semua persoalan dan keraguan di bawah surat ikatan itu yang merupakan suatu keputusan yang konklusif dan mengikat kepada pemegang nota, menekankan bahawa suatu resolusi khas diperlukan untuk membatalkan resolusi EOD itu. Pandangan ini telah digunakan oleh pihak
I bank. Kumpulan Tan Sri Lim tidak dapat mengumpulkan sokongan 75% pemegang nota yang diperlukan untuk meluluskan suatu resolusi khas. Suatu resolusi biasa hanya memerlukan sokongan 50% pemegang nota. Kumpulan Tan Sri Lim menggunakan pandangan bahawa suatu resolusi biasa mencukupi untuk membatalkan resolusi EOD dan memfailkan SP ini untuk memohon

suatu pengisytiharan ('resolusi yang dicadangkan') bahawa suatu resolusi biasa mencukupi, antaranya, untuk mengarahkan pemegang amanah untuk memberhentikan tindakan penguatkuasaan terhadap tanah yang dicagar ('resolusi untuk tidak meneruskan penguatkuasaan'), untuk menetapkan penilaian yang lebih tinggi bagi tanah yang dicagar ('resolusi penilaian yang lebih tinggi') dan untuk menjual atau sebaliknya melupuskan tanah yang dicagar itu ('resolusi pelupusan aset'). Pihak pemegang amanah dan bank menghujahkan bahawa resolusi yang dicadangkan, sebenarnya, hendak mengubah suai atau membatalkan peruntukan sedia ada dalam surat ikatan amanah, terutamanya klausa 22.1(c), 14.3 dan 14.5, pengubahsuaian atau pembatalan itu hanya boleh dibuat melalui suatu resolusi khas di bawah klausa 17(e) Jadual Ketiga kepada surat ikatan amanah. Pihak bank menghujahkan bahawa resolusi yang dicadangkan itu merupakan suatu percubaan oleh Kumpulan Tan Sri Lim untuk menggunakan kuasa untuk menentukan, memberi hak dan budi bicara pemegang amanah di bawah surat ikatan amanah untuk mengambil apa-apa langkah yang sewajarnya untuk menyegerakan penghasilan tanah yang dicagar itu dan menjaga kepentingan pemegang nota. Pihak bank, sebagaimana sepatutnya, telah memfailkan suatu tuntutan balas untuk mengisytiharkan bahawa suatu resolusi khas diperlukan untuk resolusi yang dicadangkan itu dilaksanakan.

Diputuskan, mengenepikan SP dan membenarkan tuntutan balas:

(1) Resolusi yang dicadangkan dengan jelasnya merupakan suatu pembatalan resolusi EOD itu. Resolusi itu telah dengan efektifnya mengurangkan kuasa dan budi bicara pemegang amanah untuk mengambil tindakan pengambilan semula menurut klausa 14.3 dan 14.5 surat ikatan amanah. Sekiranya resolusi yang dicadangkan itu dibenarkan, kesemua kuasa dan budi bicara yang terletak pada pemegang amanah di bawah klausa itu akan menjadi suatu khayalan sahaja dan kuasa dan budi bicara itu akan dipindahkan ke tangan mereka yang memegang 50.25% nota-nota itu yang akan memprejudiskan pihak bank (yang memegang 48.5%) dan orang awam (1.2083%). Resolusi yang dicadangkan itu menjangkau terlalu jauh dan merupakan suatu yang draconian berbanding dengan hak pemegang nota dan nasib tanah yang dicagarkan itu. Oleh itu, pemegang amanah mempunyai hak untuk menghendaki supaya resolusi yang dicadangkan itu diluluskan melalui resolusi khas (lihat perenggan 116–117 & 133).

(2) Resolusi yang dicadangkan akan merosakkan semua usaha pengambilan semula/penguatkuasaan oleh pemegang amanah, yang akan menyebabkan suatu pembatalan atau pengubahsuaian kepada hak/kepentingan pemegang nota dan pencerobohan substansial ke atas dan/atau mengurangkan kuasa/budi bicara pemegang amanah dan menurunkan dengan efektif kesemua kuasa/budi bicara itu ke tangan Kumpulan Tan Sri Lim yang, bergantung kepada rancangan utama

mereka, akan atau mungkin akan menyebabkan tiada pengambilan semula dan/atau penguatkuasaan terhadap GPB dan/atau anak syarikatnya dan/atau terhadap tanah yang dicagar itu. Tindakan ini setara pada setarafnya suatu pengubahsuaian atau pembatalan terma surat ikatan amanah dan hak pemegang nota (yang akan menyebabkan klausa 17(d) dan/atau (e) Jadual Ketiga surat ikatan amanah terpakai) dan oleh yang demikian resolusi yang dicadangkan itu hanya boleh dilaksanakan melalui resolusi khas. Klausa 22.1(c) surat ikatan amanah memberi pemegang amanah kuasa untuk menentukan 'semua persoalan dan keraguan yang berhubung dengan mana-mana peruntukan' surat ikatan amanah. Pihak pemegang amanah, dengan sebab dan penjelasan yang mencukupi dan munasabah, telah menetapkan bahawa resolusi yang dicadangkan itu hendaklah diluluskan melalui suatu resolusi khas. Penetapan itu merupakan suatu yang konklusif dan mengikat kepada semua pemegang nota. Aduan yang menyatakan bahawa pemegang amanah tidak boleh mempunyai budi bicara yang mutlak dan kukuh merupakan suatu yang tidak perlu dipertimbangkan kerana surat ikatan amanah itu sendiri yang telah memberikan kuasa yang luas kepada pemegang amanah untuk memutuskan, sebagaimana yang difikirkannya sesuai, sama ada suatu perkara itu, bergantung kepada kepentingan dan impaknya ke atas hak dan keberhakan pemegang nota, sepatutnya dilakukan melalui resolusi khas (lihat perenggan 124 & 127–129).

(3) Resolusi penilaian lebih tinggi oleh pihak plaintif yang hendak mengenakan suatu penilaian yang lebih tinggi ke atas harta yang dicagarkan itu adalah tidak logik. Harga rizab, yang menggambarkan nilai pasaran, telahpun ditetapkan untuk tanah yang dicagarkan itu oleh mahkamah dan pada masa itu pun, lelongan dua daripada harta itu telah dibatalkan kerana tiada pembida. Adalah tidak logik untuk menetapkan suatu penilaian yang lebih tinggi dan untuk menaikkan harga rizab kerana itu hanya akan menafikan kemungkinan mengumpan pembida untuk membida tanah itu. Bagi resolusi pelupusan aset, ia sangat menggunakan kuasa dan fungsi pemegang amanah di bawah surat ikatan amanah berbandingan dengan penguatkuasaan dan/atau penghasilan tanah yang dicagarkan itu dan meletakkan keseluruhannya pada tangan mereka yang dapat mengumpulkan undi yang cukup bagi suatu resolusi biasa (lebih daripada 50%) tetapi bukan suatu resolusi khas, yang memerlukan 75% undi (lihat perenggan 119–121).

(4) Adalah penting pihak plaintif yang sebelum ini telah mengeluarkan suatu surat bertarikh 28 Oktober 2014 kepada pihak pemegang amanah yang mencadangkan bahawa suatu resolusi khas diluluskan bagi penjualan Tanah Sepang melalui perjanjian persendirian. Surat itu merupakan suatu manifestasi pengakuan yang jelas bahawa pelupusan aset itu mestilah dilakukan melalui suatu resolusi khas. Oleh itu, pihak plaintif, dan termasuklah Kumpulan Tan Sri Lim, terestop daripada menyatakan

bahawa resolusi yang dicadangkan itu boleh dilakukan melalui resolusi biasa. Ia merupakan suatu yang sah untuk memeriksa pelakuan lalu pihak-pihak untuk menentukan bagaimana mereka telah mentafsirkan terma surat ikatan amanah. Jika pihak-pihak, melalui perbuatan, telah memberikan suatu makna tertentu kepada suatu terma dalam kontrak, maka estopel akan terpakai untuk mengecualikan mereka daripada menyatakan sebaliknya (lihat perenggan 122–123).

(5) Hujahan Kumpulan Tan Sri Lim bahawa hasrat Kumpulan itu berkenaan dengan resolusi yang dicadangkan itu tidak boleh dipakai kerana mereka tidak akan dapat mengumpulkan 75% daripada undi dalam mana-mana mesyuarat pemegang nota untuk meluluskan suatu resolusi khas merupakan suatu hujahan yang tidak berasas kerana ia menafikan fakta bahawa hak, keberhakkan dan kepentingan pemegang nota adalah setaraf dan setiap seorang tidaklah lebih hebat daripada yang lain. Semata-mata hanya Kumpulan itu secara kolektifnya memegang 50.25% nota-nota tidak sama dengan mereka mempunyai hak majoriti yang membolehkan mereka membuat keputusan melalui resolusi biasa semua perkara yang berhubungan dengan penguatkuasaan/penghasilan tanah-tanah yang dicagarkan. Pihak pemegang amanah telah dilantik 'demi kepentingan pemegang', iaitu kesemua pemegang nota dan bukan sahaja untuk bertindak bagi satu pihak atau satu pihak yang lain. Oleh yang demikian, apa-apa wang yang diambil semula atau didapatkan balik hendaklah diagihkan kepada semua pemegang nota sepadan dengan jumlah nota yang mereka pegang (lihat perenggan 125–127).]

Notes

For cases on trust deed in general, see 12(2) *Mallal's Digest* (5th Ed, 2015) paras 3301–3303.

Cases referred to

Assénagon Asset Management SA v Irish Bank Resolution Corp Ltd (formerly Anglo Irish Bank Corp Ltd) [2013] 1 All ER 495; [2012] EWHC 2090 (Ch), Ch D (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (refd)

Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Brett Andrew Macnamara v Kam Lee Kuan [2008] 2 MLJ 450; [2008] 7 CLJ 631, HC (refd)

British America Nickel Corpn Ltd v M J O'Brien Ltd [1927] AC 369, PC (refd)

Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor [1995] 1 MLJ 513, FC (refd)

City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1985] 1 MLJ 285, CA (refd)

A *Everett v Griffiths* [1924] 1 KB 941, KBD (refd)
Hoh Kiang Ngan & Ors v Hoh Han Keyet [2013] 4 MLJ 199; [2013] 5 CLJ 222, CA (refd)
Kedah Cement Sdn Bhd v Masjaya Trading Sdn Bhd [2007] 3 MLJ 597, FC (refd)
B *Kong Ming Bank Bhd v Leong Ho Yuen* [1982] 2 MLJ 111, FC (refd)
Maybank Investment Bank Berhad & Ors v Million Westlink Sdn Bhd & Anor [2015] MLJU 2252; [2015] 1 LNS 1301; [2016] AMEJ 204, HC (refd)
Mercantile Investment and General Trust Company v The International Company of Mexico [1893] 1 Ch 484, QBD (refd)
C *Ng Tiou Hong v Collector of Land Revenue, Gombak* [1984] 2 MLJ 35; [1984] 1 CLJ Rep 289, FC (refd)
Smith and Fawcett Ltd, In Re [1942] Ch 304, CA (refd)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464; [2016] 1 CLJ 177, FC (refd)
D *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151, FC (refd)
Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee) [1998] 4 MLJ 651; [1998] 4 CLJ 812, CA (refd)
E *Sutera Harbour Holdings Sdn Bhd v Malaysian Trustees Berhad* [2012] MLJU 688; [2012] 1 LNS 537, HC (refd)
Terengganu State Economic Development Corporation v Nadefinco Ltd [1982] 1 MLJ 365, FC (refd)
Wasco Coating Malaysia Sdn Bhd v Nacap Asia Pacific Sdn Bhd & Ors [2015] 5
F CLJ 462, CA (refd)

Legislation referred to

Companies Act 1965 ss 74(3), 176
National Land Code s 257(d)
G Rules of Court 2012 O 7, O 28

K Kirubakaran (Jamie Wong with him) (Jamie Wong) for the plaintiff.
S Ramesh (Melisa Tai with him) (Adnan Sundra & Low) for the first defendant.
Yoong Sin Min (Ng Hooi Huang with him) (Shook Lin & Bok) for the second,
H *third, fourth, fifth and sixth defendants.*
Wong Rhen Yen (S Ravenesan and Siti Nur Amirah Aqilah with him) (S Ravenesan) for the seventh defendant.
Malik Imtiaz Sarwar (Surendra Ananth and Nik Nurul Atiqah N Yusof with him) (Faizah Lim & Assoc) for the eighth defendant.
I

Nantha Balan J:

INTRODUCTION

[1] This is an application by the plaintiff by way of an originating summons ('the OS') under O 7 and/or O 28 of the Rules of Court 2012 and/or the inherent jurisdiction of this court for, inter alia, the interpretation of a trust deed dated 11 December 2002 ('the trust deed') and for declaratory reliefs as a consequence of the interpretation of the terms of the trust deed. For ease of reference, the parties shall be referred to by the following nomenclature:

(a) the first defendant as 'the trustee';

(b) the second to sixth defendants collectively as 'the banks'; and

(c) the plaintiff, the seventh defendant and the eighth defendant ('Tan Sri Lim') collectively as 'the Tan Sri Lim Group'.

[2] The reliefs sought in the OS essentially arises out of a dispute between two groups of holders of redeemable convertible secured notes ('the notes') which were issued by the issuer, Gula Perak Bhd ('GPB'). The holders of the notes shall be referred to as 'the noteholders'. The Tan Sri Lim Group presently constitute the majority of the noteholders as they hold 50.25% of the notes whereas the banks hold 48.54% of the notes. GPB had defaulted in payments under the notes and failed to redeem all the notes by the maturity date of 22 April 2008. As at the maturity date, the amount outstanding and owing by GPB to the noteholders was RM327,472,217.14.

[3] Accordingly, as a result of GPB's failure to redeem the notes by the maturity date, an event of default was declared by way of an ordinary resolution dated 29 June 2010 based on cl 14.2 of the trust deed. By the same resolution, the Trustee was instructed to commence legal and enforcement proceedings against GPB and its subsidiaries as provided for in cl 14.3 of the trust deed. The resolution dated 29 June 2010 shall be referred to as 'the EOD resolution'. Thus, pursuant to the EOD resolution, the noteholders directed the trustee to take the necessary enforcement action to, inter alia, realise the security which was given under the notes.

THE DISPUTE

[4] By the prayers sought in the OS, the Tan Sri Lim Group now wish to revoke the EOD resolution and stop all enforcement or recovery action against GPB and/or its subsidiaries and/or the realisation of the security by the trustee. According to the Tan Sri Lim Group's interpretation of the trust deed, the EOD resolution can be revoked via an ordinary resolution. On the other hand, the trustee and the banks take the common position that under the trust deed,

a special resolution is necessary for this purpose. Thus, the gravamen of the dispute between the parties is whether the resolutions that were proposed by the Tan Sri Lim Group may be passed by way of ordinary resolution or whether it requires a special resolution.

[5] In this regard, it is relevant to note that pursuant to cl 2 of Schedule 3 of the trust deed, special resolution and ordinary resolution are defined as follows:

(a) a *special resolution* is defined to mean 'a resolution passed ... and carried by a majority consisting of not less than three-fourth of the persons voting thereat upon a show of hands or if a poll is duly demanded, by a majority consisting of not less than three-fourth of the votes given on such poll', ie *75% of the noteholders*; and

(b) an *ordinary resolution* is defined to mean 'a resolution passed ... and carried by a majority consisting of more than half (1/2) of the persons voting thereat upon a show of hands or if a poll is demanded, by a majority consisting of not less than half (1/2) of the votes given on such poll', ie *more than 50% of the noteholders*.

[6] It is therefore obvious that with a majority of 50.25% of the notes on their side, the Tan Sri Lim Group will only be able to secure the passing of an ordinary resolution but not a special resolution, unless they are able to garner the support of the banks so as to achieve the 75% threshold at a meeting of noteholders. Admittedly, the banks are not likely to support the resolutions to, inter alia, revoke the EOD resolution. Thus, an interpretation of the trust deed that favours an ordinary resolution is critical for the passing of the resolution that have been proposed by the Tan Sri Lim Group, otherwise these resolutions are unlikely to be passed.

THE DECLARATIONS

[7] I turn now to the reliefs that are sought under the OS. Under the OS, the plaintiff has sought four declarations and they are (in verbatim) as follows:

(a) at prayer (3) of OS — 'A declaration that a resolution proposed to be passed by the Holders ('Holders') of 5 year Redeemable Convertible Secured Notes 2002/2007 with an aggregate nominal value of RM288,820,655.00 ('RCSN') issued by GPB ('GPB'), stating inter alia 'That the Trustee be and is hereby authorised and directed to discontinue and cease all legal actions, legal proceedings and enforcements without costs against the Issuer and its subsidiary companies listed in Schedule 5 of the Trust Deed' ('the proposed resolution'), or any other resolution to similar effect, may be passed by way of an ordinary resolution during any meeting of the Holders of the RCSN as prescribed in the Trust Deed' ('the resolution to discontinue enforcement');

(b) at prayer (4) of the OS — 'A declaration that a resolution proposed to be passed by any one or more of the Holders of the RCSN to adopt, submit and/or agree to a higher valuation of the Charged Properties shall be by way of an ordinary resolution' ('the higher valuation resolution');

(c) at prayer (5) of the OS — 'A declaration that a resolution proposed to be passed by any one or more of the Holders of the RCSN for the disposal and/or sale of the Charged Properties shall be way of an ordinary resolution' ('the asset disposal resolution'); and

(d) at prayer (6) of the OS — 'A declaration that apart from the items specified under cl 17, Schedule 3 of the Trust Deed, any other resolution to be carried pursuant to the Trust Deed shall be by way of an ordinary resolution' ('the all-encompassing resolution').
(All the resolutions referred to in the OS shall be collectively referred as ('the proposed resolutions').

BACKGROUND FACTS

[8] GPB had issued the notes with an aggregate nominal value of RM288,820,655. The banks had subscribed for and together still hold 48.54% of the notes. The remaining notes had initially been held by RHB Bank Bhd, CIMB Bank Bhd, Ambank (M) Bhd and Malayan Industrial Development Finance Bhd ('the other financiers').

[9] There are various other individuals with very small holdings (1.47%) of the notes as well. The first defendant was appointed as the trustee for the noteholders and holds the security for payment of the notes for the benefit of the noteholders. The matters relating to the notes and the rights of the noteholders are all governed by the trust deed.

THE SECURITY FOR THE NOTES

[10] As security for GPB's liability under the notes, inter alia, the following lands were charged as security by GPB or its subsidiary:

(a) two lands in Kuala Lumpur ('the KL lands') charged by GPB;

(b) two lands held, both in Mukim Setapak, Kuala Lumpur ('the Setapak lands') charged by GPB;

(c) nine lots of lands, all in Mukim Cheras, District of Hulu Selangor ('the Batang Berjuntai lands') charged by GPB;

(d) four lots of lands on which the Dynasty Hotel ('the Dynasty Hotel lands') is situated — charged by Dynawell Corporation (M) Sdn Bhd ('Dynawell'). Dynawell is a subsidiary of GPB; and

(e) a land on which the Empress Hotel ('Empress Hotel Land') is situated — charged by KSB Requirements & Rest Sdn Bhd ('KSB'). KSB is a subsidiary of GPB.

The aforesaid lands shall be referred to collectively as ('the charged lands').

GPB'S DEFAULT

[11] By the terms of the trust deed, the trustee is fully empowered to take action against GPB and the security to recover monies due under the notes in the event of default in payments under the notes. It is undisputed that GPB had defaulted in payments due to the noteholders under the notes and has failed to redeem all the notes by the maturity date of 22 April 2008.

[12] On 29 June 2010, the EOD resolution was passed by the noteholders to declare that an event of default has occurred in respect of the notes and to direct the trustee to, inter alia, take all necessary actions to recover the outstanding amounts owing by GPB under the notes, which included the realisation of all security given to the trustee. Pursuant to the EOD resolution, the trustee proceeded with various legal actions to realise the security including charge actions in respect of the charged lands, to recover monies due to the noteholders.

RESTRAINING ORDERS — SECTION 176 OF THE COMPANIES ACT 1965

[13] In the interim, not less than seven contributories of GPB had obtained or attempted to obtain restraining orders under s 176 of the Companies Act 1965, on an ex-parte basis, to, inter alia, restrain the trustee's actions. It is alleged that these actions were all intended to prevent the trustee from recovering monies due under the notes. Ultimately, each of the exparte orders were successfully set aside.

WINDING UP AGAINST GPB

[14] On 1 March 2013, GPB was ordered to be wound up by the Shah Alam High Court by way of Winding-Up Petition No MT-FLJC 28–81 of 2011 and liquidators were appointed. Since the winding up of GPB, contributories of GPB have filed various applications in the winding up court to, inter alia, remove the liquidators appointed over GPB or for leave to intervene in the charge actions or various other actions against the trustee.

ACQUISITION OF NOTES BY THE TAN SRI LIM GROUP

[15] On 28 November 2013, two directors of GPB, ie Datuk Rahim Baba and Tan Sri Datuk (Dr) Elyas Omar, issued a letter to the trustee to inform, inter alia, that GPB had purportedly procured a friendly group of investors to acquire more than 50% of the notes from the other financiers and that such group would be seeking to discontinue all actions against the security for the notes.

[16] This group consisted of the plaintiff, the seventh defendant and the eighth defendant (who are collectively referred to in this judgment as 'the Tan Sri Lim Group'). The Tan Sri Lim Group have since collectively acquired 50.25% of the notes from the other financiers with effect from the dates of the various relevant court vesting orders obtained by them. It is not in dispute that the plaintiff and the seventh defendant are expressly admitted to be aligned and/or connected to Tan Sri Lim (the eighth defendant). The Tan Sri Lim Group are friendly to GPB. The eighth defendant was previously the managing director of GPB.

THE CHARGE ACTIONS

[17] In order to recover the outstanding sums under the notes for the noteholders, the trustee has pursuant to the EOD Resolution taken, inter alia, the following actions in respect of the charged lands:

(a) Kuala Lumpur High Court Originating Summons No 24NCVC-2980–11 of 2011 ('Dynasty Hotel charge action'), whereby an order for sale of the Dynasty Hotel Lands was obtained on 11 September 2013;

(b) Shah Alam High Court Originating Summons No 24F-345–11 of 2011 ('Empress Hotel charge action'), whereby an order for sale of the Empress Hotel land was obtained on 18 January 2013;

(c) Kuala Lumpur High Court Originating Summons No 24FC-868–12 of 2013 ('KL lands charge action'), whereby an order for sale of the KL lands was obtained on 4 March 2014;

(d) Shah Alam High Court Originating Summons No 24FC-119–02 of 2014 ('Batang Berjuntai lands charge action'), whereby an order for sale for the Batang Berjuntai lands was obtained on 17 March 2014; and

(e) land inquiry for the Setapak lands at the land office ('Setapak land office action'), whereby an order for sale of the Setapak lands was obtained on 20 October 2015.

A INTERVENER/STAY APPLICATIONS

[18] The Tan Sri Lim Group has jointly and/or severally filed numerous intervener and/or stay applications to stop the trustee from proceeding with the charge actions. These applications were premised on the allegation that they were now the majority noteholders who have allegedly acquired 50.25% of the notes. All of the intervener applications by the Tan Sri Lim Group were dismissed with costs by the courts in the charge actions, details of which are as follows:

No	Suits/Actions	Application	Application By	Outcome
Empress Hotel Land				
(i)	Empress Hotel Charge Action	Intervener application to stop the Empress Hotel charge action and for stay of proceedings pending the disposal of the same.	Plaintiff	Dismissed with costs on 23 September 2013
(ii)		Interim stay application to stop and delay the Empress Hotel charge action.	Tan Sri Lim Group collectively	Dismissed with costs on 22 January 2014
(iii)		Intervener application to stop the Empress Hotel charge action and for stay of proceedings pending the disposal of the same.	Tan Sri Lim Group collectively	Dismissed with costs on 3 February 2014
Dynasty Hotel Land				

(iv)	Dynasty Hotel Charge Action	Intervener application to stop the Dynasty Hotel charge action and for stay of proceedings pending the disposal of the same.	Tan Sri Lim Group collectively	Dismissed with costs on 6 February 2014
Dynasty Hotel Land				
(v)	Court of Appeal Civil Appeal No W-02(NCVC) (A)-2079–09 of 2013 (appeal filed by the provisional liquidator of Dynawell against the order for sale dated 11 September 2013)	Intervener and stay application to support Dynawell's provisional liquidator's appeal and to stop and delay the enforcement of the order for sale dated 11 September 2013.	Plaintiff	Dismissed with costs on 20 February 2014
KL Lands				
(vi)	KL Lands Charge Action	Intervener application to stop the KL Lands charge action and for stay of proceedings pending the disposal of the same.	Tan Sri Lim Group collectively	Dismissed with costs on 4 March 2014

[19] Further, the plaintiff had also applied to intervene in the Seremban High Court Originating Summons No NCVC-24M-63–6 of 2013 filed by Dynawell for an exparte restraining order under s 176 of the Companies Act 1965. The application was dismissed and there was no appeal against this decision.

OTHER COURT PROCEEDINGS

[20] Ultimately, the plaintiff did not succeed in intervening in any of the charge actions. Thereafter, by its letter dated 19 February 2014 to the trustee, the plaintiff requested for a noteholders meeting to be convened for the purpose of passing, inter alia, an ordinary resolution (requiring a simple

majority) to revoke the EOD resolution and to direct the trustee to discontinue and cease all legal actions and enforcement proceedings in respect of the notes.

[21] However, the trustee held the view that the plaintiff's proposed resolution has to be passed by a special resolution (requiring 75% majority of the noteholders) instead of an ordinary resolution in accordance with the terms of the trust deed. The banks also expressly notified the trustee that such proposed resolution can only be carried out by way of a special resolution.

[22] By notice of 11 March 2014, the trustee notified the noteholders that it would be convening a noteholders meeting on 4 April 2014 to vote on the plaintiff's proposed resolution by way of a special resolution.

PREVIOUS COURT ACTIONS VIS A VIS PROPOSED RESOLUTIONS

[23] Pursuant thereto, the following actions were filed to, inter alia, determine whether the proposed resolutions was to be carried by way of an ordinary or special resolution:

(a) the plaintiff filed its action by way of Kuala Lumpur High Court Originating Summons No 24NCC-99–03 of 2014;

(b) the banks filed their action by way of Kuala Lumpur High Court Originating Summons No 24NCC-113–03 of 2014;

(c) on 2 April 2014, which was two days before the noteholders' meeting on 4 April 2014, the seventh defendant filed its action by way of Kuala Lumpur High Court Originating Summons No 24NCC-134–04 of 2014 ('the seventh defendant's action'), together with an injunction application where the seventh defendant sought to restrain:

(i) the trustee from convening the noteholders' meeting on 4 April 2014; and

(ii) the trustee from taking further recovery action and proceeding, inter alia, with the public auction of the Dynasty Hotel lands fixed on 14 April 2014.

[24] On 3 April 2014, the seventh defendant's injunction application was heard on an urgent basis solely on the injunction prayer to restrain the trustee from proceeding with the noteholders' meeting on 4 April 2014. However, in the midst of submissions, the seventh defendant withdrew the prayer and the court accordingly struck out the same. The court then fixed the second prayer therein, ie for an injunction of the recovery action, for hearing on 10 April 2014.

[25] On 10 April 2014, parties attended before the judge for the inter partes

hearing of the plaintiff's said injunction application. The banks, the Tan Sri Lim Group and the trustee, however, embarked on negotiations which lead to the consent order of 11 April 2014 ('the consent order') whereby, inter alia:

(a) the trustee would vacate the date of the auction of the Dynasty Hotel lands on 14 April 2014 and agreed not to apply for auction dates for any of the charged lands until after 14 May 2014;

(b) the Tan Sri Lim Group, and parties related to the eighth defendant undertook not to file any further stay and/or injunction applications to prevent any auctions from proceeding; and

(c) the eighth defendant (Tan Sri Lim) and/or parties related to him will negotiate a buy-out of the notes held by the banks and such purchase agreement shall be concluded and signed by 2 June 2014.

SALE AND PURCHASE OF THE BANKS' NOTES AND DEFAULT THEREUNDER

[26] Thereafter, the banks and the eighth defendant began to negotiate with a party connected to the eighth defendant, one Million Westlink Sdn Bhd ('Million Westlink'), for its purchase of the notes held by the banks.

[27] The negotiations culminated in the sale and purchase agreement dated 5 August 2014 ('the SPA') for the banks' notes, executed between the banks, Million Westlink and the eighth defendant for the purchase of the banks' notes by Million Westlink. The eighth defendant guaranteed the performance of the SPA pursuant to his guarantee dated 5 August 2014 ('the guarantee') between the banks and the eighth defendant.

[28] Under the terms of the SPA, it was agreed, inter alia, that:

(a) the purchase price of RM146,458,246.20 for the banks' notes were to be paid upon the due dates set out in the SPA; and

(b) in the event of default under the SPA, the banks are entitled to proceed concurrently to enforce and SPA and the guarantee, as well as for the trustee to proceed with the charge actions for recovery of the outstanding amounts under the notes. In this regard, the Tan Sri Lim Group had issued irrevocable letters of instructions dated 5 August 2015 ('letters of instructions') to the trustee, inter alia, instructing the trustee to continue with recovery action of the notes, including the charge actions, upon receipt of notification by the banks that there is default under the SPA which has not been remedied, and that the Tan Sri Lim Group would not file or take any action to restrain the trustee from doing so.

[29] Million Westlink and the eighth defendant defaulted in their payment

obligations under the SPA and the guarantee respectively. The banks thus commenced their action vide Kuala Lumpur High Court Suit No 22NCC-163–03 of 2015 ('the SPA action') to enforce their rights under the SPA and the guarantee.

[30] In the interim, upon notification by the banks to the trustee that there was a default under the SPA and in accordance with standing instructions earlier furnished by the banks and the Tan Sri Lim Group, the trustee continued with the charge actions to recover the outstanding amounts due and owing under the notes.

[31] However, under the SPA Action, Million Westlink and the eighth defendant filed a counterclaim against the banks and the trustee ('the SPA counterclaim') alleging, inter alia, that the banks had breached the terms of the SPA and seeking for perpetual injunctions to restrain the trustee from proceeding with the recovery action of the notes, including the charge actions. They also applied for an interim injunction to that effect, pending the disposal of the counterclaim ('the injunction application').

[32] On 3 September 2015, the injunction application was dismissed by the High Court. Million Westlink's and the eighth defendant's motion to the Court of Appeal for an Erinford injunction was also dismissed by the Court of Appeal on 8 September 2015. Million Westlink and the eighth defendant have since withdrawn the appeal against the dismissal of the injunction application.

[33] Under the SPA action, the banks had applied for summary judgment as well as to strike out the counterclaim. The trustee, who had been brought in pursuant to the counterclaim, also applied to strike out the counterclaim.

[34] On 5 October 2015, the High Court ordered that the SPA counterclaim against the banks and the trustee be struck out, and also granted judgment against Million Westlink and the eighth defendant for the outstanding purchase price due to the banks, in the global sum of RM124,489,509.27 with interest of 5%pa from date of judgment thereon.

THE RESURRECTION OF THE PROPOSED RESOLUTIONS

[35] By its letter dated 26 June 2015 to the trustee, the plaintiff again requisitioned for a meeting of the noteholders to be convened to consider a proposed resolution, to be carried out by way of an ordinary resolution, directing the trustee to adopt the highest and latest value of any valuation which may have been submitted and/or to be submitted to the court or any other authorities, for the purpose of determining the auction price for the charged lands.

[36] By letters dated 30 June 2015, 10 July 2015 and 14 July 2015, the trustee and the plaintiff corresponded on the resolutions proposed by the plaintiff. The trustee maintained its position that such resolutions could only be carried by way of special resolution. Further, the trustee asserted that the reserve prices for the charge lands had already been fixed by the courts in the charge actions respectively.

[37] As far as the banks were concerned, their position was stated by way of a letter dated 16 July 2015 issued through their solicitors, Messrs Shook Lin & Bok wherein they also took the position that the resolutions as proposed by the plaintiff were too uncertain and must, in any event, be considered by way of special resolution.

THE ARGUMENTS

[38] The trustee's and bank's main position is that the proposed resolutions amount to a release of GPB's obligations and modifies and/or abrogates the rights of noteholders and therefore falls within cl 17(c) and (d) of Schedule 3 of the trust deed. They take the common position that the proposed resolutions can only be carried out by way of a special resolution (ie a 75% majority is required) by relying on cl 17(c) and (d), Schedule 3 of the trust deed. Clauses 17(c) and (d), Schedule 3 of the trust deed are reproduced below:

> Clause 17
>
> A meeting of the Holders shall in addition to all other powers have the following powers exercisable by Special Resolution only, that is to say:-
>
> ...
>
> (c) the power to sanction the release of the Company and/or any other surety from payment of all or any part of the nominal value or face value owing upon the 2002/2007 RCSN other monies payable pursuant to these presents;
>
> (d) the power to sanction any modification, abrogation or compromise of or arrangement in respect of the rights of the Holders against the Company and/or any surety whether such rights shall arise under the Trust Deed or otherwise.

[39] In countering the trustee's argument that the proposed resolutions amount to a release of GPB's obligation and/or modification, abrogation of the noteholder's rights, it was argued for the Tan Sri Lim Group that upon a proper construction of the trust deed, the proposed resolutions sought to be passed do not fall within cl 17(c) and 17(d) of the Schedule 3 of trust deed.

[40] It was also submitted that in these circumstances, it is appropriate to imply and/or it goes without saying that proposed resolutions, do not fall

within the ambit of Schedule 3 cl 17 of the trust deed and ought to be passed by way of ordinary resolutions.

[41] On the other hand, the trustee relies upon cl 22.1(c) of the trust deed to contend that they have requisite power to determine that the proposed resolutions should be by way of special resolution. The banks agree that the trustee has such power under cl 22.1(c) of the trustee deed. Clause 22.1(c) of the trustee deed reads as follows:

> Power of Determination: the Trustee shall as between itself and the Holders and all persons claiming under or through them have full power to determine all questions and doubts arising in relation to any of the provisions of these presents and every determination, whether made upon a question actually raised or implied in the acts or proceedings of the Trustee, shall be conclusive and binding on all such persons;

[42] It was submitted on behalf of the Tan Sri Lim Group that cl 22.1(c) of the trust deed does not provide the trustee with an absolute and/or unfettered discretion to determine which motions require special resolutions.

THE RELEVANCE OF PREVIOUS CONDUCT

[43] Counsel for the Tan Sri Lim Group also maintained that the purposes of interpreting the relevant terms of the trust deed, the previous conduct or the legal actions involving the Tan Sri Lim Group vis a vis the enforcement action by the trustees are irrelevant and cited the case of *Kedah Cement Sdn Bhd v Masjaya Trading Sdn Bhd* [2007] 3 MLJ 597 at paras 43–46 where the court held as follows:

> With reference to conduct, we find no popular support within our local shores that subsequent conduct can be used for the purpose of interpreting a contract retrospectively ... in any event, we find that the application of subsequent conduct by the Court of Appeal, against the factual matrix of the case, is totally misconceived.

[44] In terms of the approach to interpretation of the trust deed, counsel for the Tan Sri Lim Group argued that a court interpreting a private contract is not confined to the four corners of the document and is entitled to look at the factual matrix which forms the background to the transaction. Second, he said that the factual matrix which forms the background in the transaction includes all material that was reasonable available to the parties. Third, counsel said the interpreting court must disregard any part of the background that is declaratory of subjective intent only.

[45] Lastly, he said the court should adopt an objective approach when interpreting a private contract, see: *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597.

[46] It was submitted that the factual matrix (ie that of the past litigations between the noteholders) sought to be relied on by the trustee and the banks involving conduct of the parties subsequent to the trust deed, is irrelevant and does not assist the court in determining the questions at hand. In interpreting and/or ascertaining the terms of the trust deed, the court is merely required to look at the surrounding circumstances leading up to the signing of the trust deed and the objective intentions of the parties to the trust deed.

[47] Counsel for the Tan Sri Lim Group maintained that the insistence by the trustee and the banks on introducing a series of factual matrixes subsequent to the execution of the trust deed is merely an attempt to convolute the matter at hand and to paint a black picture of the Tan Sri Lim Group, who are the majority of the noteholders.

MODIFICATION OF RIGHTS

[48] It was argued for the Tan Sri Lim Group that the proposed resolutions do not amount to a 'modification of rights'. Counsel referred to the case of *British America Nickel Corpn Ltd v M J O'Brien Ltd* [1927] AC 369, for the meaning of 'modification of rights'.

COMPROMISE

[49] As for the words, 'the power to compromise', counsel referred to the case of *Mercantile Investment and General Trust Company v The International Company of Mexico* [1893] 1 Ch 484 and submitted that the proposed resolutions do not fall within the meaning of cl 17(c) and (d) of Schedule 3 of the trust deed. The specific arguments that were taken by the Tan Sri Lim Group in support of the contention that proposed resolutions did not amount to any abrogation or modification of the rights of noteholders were as follows.

RESOLUTION TO DISCONTINUE ENFORCEMENT

[50] It was contended that the proposed resolution to discontinue enforcement only seeks to pass a resolution to revoke the EOD resolution which was passed by way of an ordinary resolution. Thus, the effect of proposed resolution is to discontinue the existing foreclosure proceedings over the charged lands so as to facilitate the sale of the charged lands via other means, ie private treaty. According to the Tan Sri Lim Group, the revocation of the EOD resolution does not in any way take away or diminish the existing rights of the noteholders over the securities in the trust deed (ie the charged lands). It was contended that the right of the noteholders over the charged lands remain the same, which is to recoup their losses under the trust deed via sale of the charged lands.

HIGHER VALUATION RESOLUTION

[51] The Tan Sri Lim Group contend that the higher valuation resolution seeks to instruct the trustee to adopt and submit a higher valuation of the charged lands in order to justify a higher auction price. It was submitted that a higher auction price would only be beneficial to the noteholders who will be in turn entitled to receive the sale proceeds from the sale of the charged lands. It was also argued that the imposition of a higher valuation does not in any way modify, compromise and/or abrogate the rights of the noteholders.

ASSET DISPOSAL RESOLUTION

[52] The asset disposal resolution authorises the trustee to dispose of the charged lands by way of private treaties. In this regard, the Tan Sri Lim Group contend that the sale of the charged lands via a private treaty allows the charged lands to be sold at a higher price and parties to the transaction will be able to enjoy more flexibility compared to a sale via a public auction. Counsel for the Tan Sri Lim Group argued that if the principles as propounded in the cases of *British America Nickel Corporation* and *Mercantile Investment and General Trust Co* are applied to the facts of the present case then the result is that:

20.1 The Proposed Resolutions do not modify the security itself (the Charged Lands) nor do they modify, compromise and/or abrogate the rights of the noteholders over the Charged Lands;

20.2 In a commercial agreement such as the trust deed in this case, disputes between the noteholders are bound to occur from time to time. The mere existence of such dispute does not automatically give rise to a compromise of rights of the noteholders. If such is the case, every resolution under the trust deed has to be done by way of a special resolution and the voting rights of the Tan Sri Lim Group would be rendered redundant;

20.3 The Proposed Resolutions, if passed, would benefit the noteholders as a whole, and not only a certain class; and

20.4 All of the rights of the noteholders under the trust deed remains the same and unaltered. The noteholders are still entitled to recoup their losses when the Charged Lands are sold, albeit in a more flexible and efficient manner and/or at a higher price.

[53] In amplification of his submissions, counsel for the Tan Sri Lim Group argued that the trust deed did not expressly state in particular what motions may be passed by special resolutions or by ordinary resolutions. In particular, the trust deed did not expressly specify nor mention how any of the proposed resolutions are to be carried out. Instead, cl 17 of Schedule 3 of the trust deed merely provides the heading 'special resolution items', hence clearly implying that unless expressly provided for in the trust deed, all other motions which

were sought to passed which does not fall under cl 17 of Schedule 3 of the trust deed should be carried out by way of an ordinary resolution.

[54] Therefore, counsel said that as the proposed resolutions are not special resolutions items under cl 17 of Schedule 3 of the trust deed, they should be carried out by way of ordinary resolution.

[55] He also argued that from the evidence, the court may imply a term that the parties to a contract must have intended that any item which does not fall under cl 17 of Schedule 3 of the trust deed should be carried out by ordinary resolution though it has not been expressly set out in the trust deed. He said that the intention of the parties is determined by the officious bystander test and the business efficacy test (see *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 at pp 169–170).

[56] Counsel also referred to the case of *Assénagon Asset Management SA v Irish Bank Resolution Corp Ltd (formerly Anglo Irish Bank Corp Ltd)* [2013] 1 All ER 495; [2012] EWHC 2090 (Ch). which he said was of great relevance to the present case. In that case, the English court was required to imply a term into a trust deed governing the relationship between the noteholders. The following principles were enunciated by the court:

> On ordinary principles, terms will only be implied into contracts if, as a matter of necessity, they are required for business efficacy purposes (*The Moorcock* (1889) 14 PD 64; [1886–90] All ER Rep 530), or if it is a matter of obvious inference that they were intended to apply to the contract (*Shirlaw v Southern Foundries (1926) Ltd and Federated Foundries Ltd* [1939] 2 All ER 113 at p 124; [1939] 2 KB 206 at p 227 per MacKinnon LJ), of if they are necessary to give effect to the reasonable expectations of the parties (*Equitable Life Assurance Society v Hyman* [2003] 3 All ER 961 at p 971; [2002] 1 AC 408 at p 459 per Lord Steyn). In the present case, if the suggested term is to be regarded as implied into the facility agreement, it would appear to me that it could only be on either the second or third basis.
>
> Although I doubt whether this would have made any difference to the outcome, I respectfully consider that an additional basis for the implication of this principle into provisions conferring powers on majorities to bind minorities may be that it is a term generally implied by the law in contracts or arrangements of particular types, as reflected in the speech of Lord Wilberforce in *Liverpool City Council v Irwin and another* [1977] AC 239, at pp 253–255. If that is as I conceive it to be the true basis for the implication of the principle, then it must still be regulated by any contrary intention demonstrated by the parties' agreement. In any event, the extent and content of the principle is inevitably dependent on the context in which it is alleged to operate: see for example per Lord Hoffmann in *O'Neill and another v Phillips and others* [1999] 2 All ER 961; [1999] 1 WLR 1092, at pp 1098F–1099B.

[57] In illustrating the officious bystander test, counsel said that since an ordinary resolution was passed to instruct to trustee to commence foreclosure

proceedings over the charged lands, thus, a reasonable man would think that the EOD resolution shall likewise be revoked by way of an ordinary resolution. In any event, since the trust deed has expressly provided for certain matters to be carried by way of special resolutions, then those resolutions which do not fall under those circumstances as provided for (ie cl 17 of Schedule 3) would have reasonably been expected to be passed by way of ordinary resolutions as this reflects the intention of the parties to the trust deed itself.

[58] In terms of the business efficacy test, counsel argued that the trust deed is a commercial document and should be interpreted in a way which gives the most business efficacy as the parties must have intended. He said that the parties to the trust deed recognised this and therefore expressly provided that the resolution to pass the EOD Resolution shall be carried out by way of an ordinary resolution.

[59] It was argued that the proposed resolutions sought to be passed by the Tan Sri Lim Group merely concern the method of disposal and valuation of the charged lands. Hence, it would not make any commercial sense for the proposed resolutions to be carried out by way of special resolution.

[60] Furthermore, the voting rights of the Tan Sri Lim Group would be destroyed and a motion can never be approved if the trustee is given a free hand to impose the requirement for special resolution as and when it wishes. Thus, counsel lamented that the trustee's insistence on a special resolution has effectively prejudiced the rights of the noteholders and the Tan Sri Lim Group continue to suffer irreparable damage.

[61] On the issue of whether the trustee has an absolute discretion to determine the manner in which resolutions are to be carried, it was submitted that the trustee's reliance on, inter alia, cl 22.1(b) and (c) of the trust deed to determine that the proposed resolution should be undertaken via special resolution and not by way of ordinary resolution, is untenable.

[62] According to counsel, the question that arises is whether or not, pursuant to cl 22.1(b) and (c) above, the trustee has the absolute and/or unfettered discretion to determine that the proposed resolutions are to be carried out by way of a special resolution.

[63] Counsel for the Tan Sri Lim Group pointed out that the exercise of the such absolute and/or unfettered discretion goes against the rights of the Tan Sri Lim Group and also by reading the trust deed as a whole, it goes against the terms of the trust deed and against the intention of the parties to the trust deed. In a final salvo, counsel argued that it does not make any commercial sense for the trustee to have such absolute and/or unfettered discretion.

[64] Counsel for the Tan Sri Lim Group referred to the propositions that were laid down in the following cases relating to interpretation or construction of a contract. In the case of *Brett Andrew Macnamara v Kam Lee Kuan* [2008] 2 MLJ 450, it was enunciated that the courts must give intention of parties as stated in the contract and such principles are applicable to the construction of a trust deed.

[65] Reference was also made to the decision of the Federal Court in *Terengganu State Economic Development Corporation v Nadefinco Ltd* [1982] 1 MLJ 365 where it was held that the clause in question must be construed with reference to the preamble in the document with other provisions so that its interpretation is derived from the whole of the document. In relation to the construction of meanings in a document, the Federal Court clearly espoused the view that expressions should be construed 'not by itself standing alone' but in the light of other words appearing in the context in which it is used on all other clauses relating thereto.

[66] In *Kong Ming Bank Bhd v Leong Ho Yuen* [1982] 2 MLJ 111, the Federal Court observed the following:

> The *contra proferentem* rule referred to by the learned trial Judge is derived from the maxim *verbafortiusaccipiuntur contra proferentem* (words are to be interpreted strongly against him who uses them). The maxim found favour in *Throckmerton v Tracey and another* (1855) 1 Plowd 145; 75 ER 222, and the House of Lords in *Neill v Duke of Devonshire* (1882) 8 AC 135 held to the effect that the words of a deed executed for valuable consideration, are to be construed, as far as they properly may, in favour of the grantee is subject to the general principle that the instrument must be construed in accordance with the expressed intention.

[67] Here, it was argued for the Tan Sri Lim Group that the trust deed is a commercial document and hence should be interpreted in a way which gives effect to the intention of the parties and also in a way which makes the most commercial sense. It was emphasised by counsel that the rights of the noteholders (as beneficiaries) under the trust deed are derived from the terms of the trust deed and also from each of their holdings respectively. As such, each of the noteholders are entitled to exercise their right to vote to pass resolutions under the trust deed in accordance to the terms therein.

[68] Elaborating further, counsel said that by interpreting cl 22.1(b) and (c) of the trust deed in isolation, the trustee attains absolute and/or unfettered discretion over all of the provisions over the trust deed. This effectively defeats the rights of the noteholders as the trustee is able to depart and/or abrogate from the terms and spirit of the trust deed at its own whims and fancies against the wishes of the noteholders.

[69] Hence, by construing cl 22.1(b) and (c) in light of all the other provisions in the trust deed, as enunciated in the cases of *Terengganu State Economic Development Corporation* and *Kong Ming Bank Bhd*, it was submitted that such discretion can only be exercised by the trustee provided that it was exercised in:

> 36.1 good faith and genuinely in the best interest of the noteholders as a whole; and
>
> 36.2 the Trustee is not allowed to depart and/or abrogate from the terms of the trust deed.

[70] Therefore, counsel for the Tan Sri Lim Group argued that the proposed resolutions are not caught under cl 17, Schedule 3 of the trust deed and are to be carried out by way of ordinary resolutions and the trustee is not allowed to impose an arbitrary condition (which is not specified under the trust deed) for the proposed resolutions to be carried out by way of special resolution.

[71] He said that the intention of the parties must be ascertained objectively, as was enunciated in the case of *Berjaya Times Square Sdn Bhd* and *Brett Andrew McNamara*. Hence, the trust deed must be construed as a commercial document whereby the intention of the parties is for them to recoup their money and/or losses due to them by GPB.

[72] Counsel emphasised that the trust deed governs the noteholders rights against GPB and also the rights between the noteholders as to the assets of GPB. As such, it was contended that parties would not have intended to allow the trustee to have the absolute power to obstruct and/or pose arbitrary difficulties for the noteholders to carry out any motions.

[73] It was contended for the Tan Sri Lim Group that it would not make any commercial sense at all for the trustees to determine whether or not any motions proposed to be passed by beneficiaries under a trust deed are to be undertaken in a particular way. The trustee's functions is only to govern the relationship between the noteholders, to protect the rights of the noteholder against GPB and to hold the assets of GPB for the benefit of the noteholders. Counsel emphasised that the trustee's function does not include determining the rights of the noteholders and/or to modify and/abrogate from the terms of the trust deed.

[74] Hence, it was argued that the proposed resolutions are in accordance with the terms of the trust deed and in accordance with the wishes of the Tan Sri Lim Group and the trustee has no right whatsoever to impose arbitrary conditions in order to extinguish and/or defeat the rights of the Tan Sri Lim Group.

TRUSTEE'S ARGUMENTS

[75] Counsel for the trustee laid great emphasis on the fact that the plaintiff, seventh and eighth defendants and parties related to GPB had, prior the filing of the OS, collectively or separately undertaken various intervention actions in the foreclosure courts to stop the foreclosure proceedings which were all futile and unsuccessful.

[76] In this regard, it was pointed out that the present OS was filed by the plaintiff on 23 September 2015 after the High Court on 3 September 2015 and Court of Appeal on 8 September 2015 dismissed the interim injunction which was sought by the eighth defendant and another party to stop the foreclosure proceedings.

[77] As such, counsel for the trustee submitted that the events prior to the OS should not be lightly brushed aside or ignored for purpose of the current OS. In this regard he relied on the decision of David Wong J (as he then was) in *Sutera Harbour Holdings Sdn Bhd v Malaysian Trustees Berhad* [2012] MLJU 688; [2012] 1 LNS 537 where the learned judge held at p 9 that:

> The crucial issue is whether he had exercise its discretion and this can only be gathered from the totality of the evidence before the court. The totality of the evidence must include the draft resolution and past resolutions adopted by the bondholders.

THE PROPOSED RESOLUTIONS

[78] Counsel for the trustee said that the proposed resolutions are for a collateral purposes and he cited the Court of Appeal case in *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee)* [1998] 4 MLJ 651; [1998] 4 CLJ 812 which had ruled that the court generally will not grant a 'cloaked declaration' that is to say, a declaration for a collateral purpose or when a declaration is sought with improper motives. Further, he referred to the case of *Everett v Griffiths* [1924] 1 KB 941 at pp 959–961 where the court considered the plaintiff's motives and dismissed the claim for declaration holding at p 960 that:

> Under these circumstances what should I decide as to the plaintiff's motives in bringing the present action? Motives are subtle things. It was said by Brian CJ in the right of Edward IV. That 'the thought of man is not triable'. Vide Year Book 17 Edw IV 1, and *Pollock on Torts*, 12th ed p 35. But if not triable in the fifteenth century it is certainly triable at the present day.
>
> In my opinion these present proceedings were commenced from the primary motives of resentment and revenge ...

[79] Counsel for the trustee said that generally a special resolution is required for the most important things which a company is empowered to do. Hence, any important change or things required to be done shall be made after due deliberation and with the sanction, active or passive, express or tacit of the greater body of the shareholders of the company. In the present case, a default has been called and the trustee has been instructed by the term of the EOD resolution to proceed to recover the monies.

[80] Hence, if the noteholders wished to now cease all actions to recover the monies, then that would trigger the application of cl 9.1, 9.2 Schedule 1 (Part II), cll 2, 17 and 18 Schedule 3, cll 32.3 and 33.2 of the trust deed. Counsel said that to stop the trustee from recovering the investment of the noteholders is a very important act which requires the noteholders to deliberate and which requires a greater body of the noteholders to approve such an important act. In addition to the above, the trustee also relies on its power of determination in cl 22.1(c) of the trust deed.

[81] The trustee does not agree with the approach taken by the plaintiff that by an ordinary resolution the trustee's authority or the EOD resolution may be revoked. According to counsel for the trustee, that is just too simplistic an approach. Elaborating further, counsel said that notwithstanding that the EOD resolution directing the trustee to declare an event of default and to commence action against GPB and securities parties (in accordance to cl 14.2 of trust deed) was based on ordinary resolution, this does not change the fact that what the plaintiff (or the seventh and eighth defendants) intend to achieve now may only be achievable by way of a special resolution. Counsel says that the plaintiff has misconstrued the interpretation of cl 14.2 and/or 14.4 of the trust deed.

[82] Further it is submitted for the trustee that the plaintiff's position that only an ordinary resolution is required given that an event of default was declared by way of an ordinary resolution would be contrary to other clauses such as cl 14.3 which fully empowers the trustee upon declaration of event of default, to, inter alia, recover the sums outstanding.

[83] Counsel for the trustee argued that it is ill-conceived for the Tan Sri Lim Group to argue that as it holds 50.25% of the notes as majority, it should be given the 'controlling interest' in the assets held by the trustee under the trust deed. He said the proposition goes against the spirit, expressed role and specific function of the trustee under the trust deed.

[84] In particular, the provisions of the trust deed contradict the Tan Sri Lim Group's argument that they should have a controlling stake or be given preferential treatment over any other noteholders. In this regard, reference was

made to the following provisions of the trust deed:

(a) recital (D) of trust deed — whereby the trustee has agreed to act as trustee for the benefit of the noteholders. There is no distinction made in the trust deed between 'majority holders' or 'minority holders';

(b) cl 2.2 — the 2002/2007 RCSN shall, as between the holders, rank *pari passu* and rateably in all respects without preference or priority amongst themselves and the security created under the security documents;

(c) trustee is the only security holder and chargee under the National Land Code for all the secured assets in Schedule 5 of the trust deed; and

(d) cl 33.2 — only the trustee may pursue the rights and remedies available under the general law to enforce the rights of the holders against the company.

THE BANKS' POSITION

[85] I turn now to the position that was taken by the bank. Here, I should add that there was an overlap in the submissions that were presented by the banks and the trustee. As such, I shall only make reference to the banks' submission so far as it is necessary. The banks filed a counterclaim and this was apparently done to ensure that there is certainty in the event that the OS is dismissed. The counterclaim is for the following orders:

(a) a declaration that any resolution which has the effect of revoking the 2010 resolution (EOD resolution) and/or any resolution to compel the trustee to discontinue and/or cease all legal actions, legal proceedings and recovery action to recover the outstanding sums under the notes shall only be effective if passed by the noteholders by a special resolution (and not an ordinary resolution) as defined in the trust deed; and

(b) a declaration that any resolution pertaining to the security for the notes shall only be effective if passed by the noteholders by a special resolution (and not an ordinary resolution) as defined in the trust deed.

[86] Counsel for the banks submitted that in interpreting a contract, the clauses in a contract cannot be read in isolation but have to be ascertained by looking at the contract as a whole and giving effect so far as possible to every part of it. The court ought to also look at the background leading to the execution of the document. The following cases relating to the principles on construction of contracts were referred to:

(a) *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] 1 MLJ 285 (CA) (see p 288);

(b) *Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor* [1995] 1 MLJ 513 (FC) (see pp 522–523);

(c) *Wasco Coating Malaysia Sdn Bhd v Nacap Asia Pacific Sdn Bhd & Ors* [2015] 5 CLJ 462 (CA) (see pp 475–476); and

(d) *Hoh Kiang Ngan & Ors v Hoh Han Keyet* [2013] 4 MLJ 199; [2013] 5 CLJ 222 (CA) (see p 207).

[87] Counsel said that the plaintiff now seeks, by way of the OS, for the court to intervene and remove the trustee's wide discretion with regard to how the proposed resolutions may be carried by the noteholders, which is contrary to cl 22.1(c) of the trust deed.

[88] It was contended by the banks that the plaintiff's proposed resolutions amounts to a modification and/or abrogation of the provisions of the trust deed, and thus can only be carried by a special resolution. Counsel for the banks argued that the proposed resolution have the effect of modifying or abrogating the provisions of the trust deed and would clearly fall under cl 17(e) of Schedule 3, trust deed. The proposed resolutions have the effect of modifying or abrogating cll 22.1(c), 14.3 and 14.5 of the trust deed as it seeks to:

(a) remove or modify the trustee's power of determination, pertaining to matters for recovery of the outstanding notes and the security for the notes; and

(b) remove or modify the trustee's entitlement and discretion to take such action as has been conferred by the trust deed, in particular cll 14.3 and 14.5, to recover monies for the noteholders.

[89] The banks are in agreement with the position taken by the trustee, that the proposed resolutions can only be carried by way of a special resolution and that the determination by the trustee under cl 22.1(c) that it should be way of special resolution is clearly in accordance with the terms of the trust deed and is for the benefit of the noteholders.

ANALYSIS AND CONCLUSIONS

[90] At the outset, I should state that counsel for the various parties had placed before the court, a plethora of case laws on interpretation of contract some of which I had referred to earlier. Counsel also referred to the most recent decision by the Federal Court, *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177 (FC) which reaffirmed the principles which were enunciated by the Federal Court in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 (FC).

[91] The factual narrative of the present case does not seem to be in dispute.

The narrative also includes the history of the previous litigation relating to failed attempts to intervene in the foreclosure proceedings. The foreclosure proceedings were initiated by the trustees as a consequence of the EOD resolution. There were also applications for injunctions to restrain the foreclosure proceedings which were all dismissed by the High Court and Court of Appeal. As I stated earlier, the seventh and eighth defendants are on the side of the plaintiff.

[92] Thus, it is not unfair to conclude that those within the Tan Sri Lim Group are all aligned to each other and they speak with one voice and are in favor of the prayers sought in the OS. It is not without significance that the eighth defendant was at one time the Managing Director of GPB.

[93] In this regard, it was suggested rather vehemently by the trustees that the Tan Sri Lim Group are partial towards GPB and that their actions in seeking the various declaratory relief are in fact a cloaked attempt at obtaining reliefs which will thwart all recovery efforts by the trustees.

[94] Indeed, the trustees have sought to impugn the conduct of the Tan Sri Lim Group as being actuated by improper motives. In this regard, I would opine that the suggestion that the Tan Sri Lim Group are partial towards GPB is not an unfair one and the inference in this regard may be made based upon a perusal of the chronology of events including the various legal actions and the conduct of the parties, all of which have been comprehensively stated in the affidavits and submissions, which I will not regurgitate here.

[95] However, it is my view that generally, it is inappropriate for matters such as 'mala fides' or 'improper motives' to be tested and/or determined on affidavits — (see judgment of Lord Greene MR in *In Re Smith and Fawcett Ltd* [1942] Ch 304).

[96] It was submitted by counsel for the Tan Sri Lim Group that the court should not make any reference to the conduct of the parties subsequent to the trust deed, when undertaking an interpretive exercise as such conduct should not have any bearing on the interpretation or construction that is to be placed on the terms of the contract as evinced in the trust deed.

[97] I agree that that is the general principle. But there are exceptions and in an appropriate case, the court may look at the subsequent conduct of the parties where such conduct sheds light on a particular term of the contract. Hence, subsequent conduct may in certain circumstances be called in aid in order to show how parties had understood a particular term to mean. It may even give rise to an estoppel.

[98] But, coming back to the main argument, I must emphasise that the subsequent conduct of the parties here, ie the Tan Sri Lim Group was to my mind relevant for an understanding of the history of the litigation prior to the filing of the OS and not so much as a 'peek' into the intention of the parties. In this regard, it is interesting that in a letter dated 28 October 2014, the plaintiff had themselves acknowledged that disposal of a charged property via private sale for a sum lower than the secured sum, was to be done via special resolution.

[99] As such, counsel for the trustees latched onto this part of the plaintiff's conduct and cited the case of *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 for the proposition that an estoppel applies against the plaintiff which now contends that an ordinary resolution is sufficient.

[100] In so far the interpretation of a trust deed is concerned, it is helpful to refer to the case *Brett Andrew Macnamara v Kam Lee Kuan* [2008] 2 MLJ 450 at pp 461–462; [2008] 7 CLJ at pp 631–633, at paras 11–14 where Balia Yusof Wahi J (as he then was) decided that when the terms of a trust deed are clear and unambiguous, it is not the court's business to go behind those written terms or to read new terms to it. This is what he said:

> In the *Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd* [1990] 2 MLJ 163, Lim Beng Choon J said:
>
> > In considering the disputes of the parties I must first of all bear in mind the general principles of construction of contract as enunciated in the *National Coal Board v Wm Neill & Son (St Helen)* [1984] 1 All ER 555 where it is said at p 560:
> >
> > > The first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are: (*1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.*
>
> In *Central Bank of India v Hartford Fire Insurance Co Ltd AIR* [1965] SC 1288, the Supreme Court of India lays stress on the second principle advocated in the *WM Neill & Sons (St Helens) Ltd* case when it says at p 1290:
>
> > Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

The same principle of construction is used in the construction of the trust deed in the instant case. In my considered view, there is not the slightest doubt about the intention of the parties. Both the plaintiff and the defendant were very conscious of the fact about the ownership of the property which was purchased on the very same day of the execution of the trust deed, and both know their relative positions, one being the trustee and the other the beneficiary of the trust.

[101] In the present case, GPB had issued the notes to various holders. Presently, the banks hold 48.5% of the notes, whereas the Tan Sri Lim Group collectively hold 50.25% and leaving a small group of 1.2083% of public spread holders. GPB defaulted on its obligation and pursuant to cl 14.2 of the trust deed, an *ordinary resolution* was passed on 29 June 2010 instructing the trustees to commence legal and enforcement proceedings against GPB and its subsidiaries. Clause 14.2 of the trust deed reads as follows:

Declaration of Event of Default: If an Event of Default shall occur, the Trustee may, and shall, if so directed by an ordinary resolution of the Holders by giving notice in writing to the Company declare the 2002/2007 RCSN then outstanding as being immediately payable by the Company whereupon the Company shall immediately pay and discharge in full the nominal value of all the 2002/2007 RCSN outstanding as at the date of receipt by the Company of the said notice.

[102] Clause 14.2 must be read with cl 14.3 of the trust deed and the latter reads as follows:

Enforcement: The Trustee, upon making the declaration referred to at Clause 14.2, shall forthwith or at any time thereafter be entitled to take such action against the Company to enforce the performance by the Company of its obligations under the Issue Documents.

[103] As such, an event of default was declared by way of an ordinary resolution (the EOD resolution) and the trustees were instructed to commence enforcement proceedings against GPB and its subsidiaries. The trustees did exactly that.

[104] After all, preamble D to the trust deed states that the trustees are to act for the benefit of the holders (of the notes). In plain language, it means that the trustees most significant and pre-eminent duty is to recover (so far as it is possible), the monies that were invested in GPB pursuant to the issuance of the notes. The amount outstanding as at the maturity of the notes (22 April 2008) (and as at the date of default 29 June 2010) was RM327,472,217.14 which has yet to be realised.

[105] Pursuant to the EOD resolution, the trustees commenced foreclosure against various properties that were charged and those proceedings are on-going in different courts.

[106] However, the Tan Sri Lim Group now seek to obtain various declarations for ordinary resolutions to be passed in order that all enforcement proceedings against GPB and its subsidiaries be withdrawn, that there be a 'higher valuation' for the charged lands and that the disposal of any of the charged lands be done by way of ordinary resolution and a general omnibus declaration that any item outside of cl 17 Schedule 3 to the trust deed, shall be by way of 'ordinary resolution'.

[107] It was argued rather strenuously for the Tan Sri Lim Group that since the event of default and instructions to the trustees to commence enforcement against GPB were done via an 'ordinary resolution' on 29 June 2010 (the EOD resolution), the revocation of that resolution should likewise be via ordinary resolution.

[108] Of course, there is no specific clause in the trust deed dealing with revocation of an enforcement resolution. And so, the Tan Sri Lim Group have submitted that a term should be 'implied' that the revocation should be by way of ordinary resolution. It was also argued that the declarations that are being sought by the Tan Sri Lim Group do not fall within cl 17(e) of Schedule 3 of the trust deed, which reads as:

> A meeting of the Holders shall in addition to all other powers have the following powers exercisable by Special Resolution only, that is to say:
>
> ...
>
> (e) the power to assent to any modification or abrogation of the provisions contained in these presents ...

[109] Learned counsel for the banks cites *Black's Law Dictionary* which defines 'abrogate' to mean 'to abolish' ... 'to annul or repeal' and 'modification' to mean 'a change to something, an alteration'. Thus, it was argued by counsel for the banks that the first three declarations sought by the Tan Sri Group have the effect of modifying or abrogating the provisions of the trust deed and falls under cl 17(e) of Schedule 3 of the trust deed which requires a special resolution and not an ordinary resolution.

[110] According to counsel for the banks, the proposed resolutions have the effect of modifying or abrogating cll 22.1(c), 14.3 and 14.5 of the trust deed as it seeks to:

(a) remove or modify the trustee's power of determination, pertaining to matters for recovery of the outstanding notes and the security for the notes; and

(b) remove or modify the trustee's entitlement and discretion to take such action as has been conferred by the trust deed in particular cll 14.3 and 14.5 to recover monies for the noteholder.

[111] For their part, the trustee has taken the position that under cl 22.1(c) of the trust deed, the trustee are empowered to determine that the proposed resolutions must be by way of special resolution and not ordinary resolution. Again it is worth emphasising that trustee's actions and exercise of powers or discretion must at all times be in accordance with the terms of the trust deed and for the benefit of the noteholders. I shall come back to this point later on in the judgment.

[112] It is quite unarguable that under cl 17(d) and (e) of Schedule 3 of the trust deed, a special resolution is required for any modification, abrogation or compromise of or arrangement in respect of the rights of the noteholders or to modify or abrogate the provisions of the trust deed.

[113] It was argued by counsel for the banks that the resolution to discontinue enforcement, if passed would essentially mean that there would be no further realisation by the trustee of any security given to secure the notes and no further action will be taken for recovery of the outstanding sums notes.

[114] At any rate, the resolution to discontinue enforcement will indefinitely delay the recovery proceedings. On that analysis, counsel argued that the proposed resolutions which seek to instruct the trustee to cease all legal and enforcement proceedings against GPB and its subsidiaries, amount to a modification or abrogation or compromise of the noteholder's rights under the trust deed.

[115] In this regard, it was pointed out that the trustee has already obtained orders for sale for all the charged properties after years of protracted litigation and by compelling the trustee to 'discontinue and cease', such charge actions and the orders for sale would be deemed abandoned and set aside. It was contended that all previous efforts and expenses incurred would have been a 'wasted exercise'. Thus, it was argued that all of these would be to the greatest disadvantage and prejudice to the noteholders.

[116] As a starting point, I must say that I am in total agreement with the submissions that were advanced by counsel for the bank and the trustee, that the proposed resolutions are patently and plainly a revocation of the EOD resolution. The proposed resolutions not only revoke the EOD resolution but it also effectively emasculates the trustee of its power and discretion to take recovery action pursuant to cll 14.3 and 14.5 of the trust deed.

[117] With the passing of the proposed resolutions, all such power and discretion which was vested in the trustees under cll 14.3 and 14.5 of the trust deed would be rendered illusory as power and discretion would now rest be transferred into the hands of those who hold 50.25% of the notes, to the utter prejudice of the banks who hold 48.5% and the public spread of 1.2083% of the notes.

[118] It is tempting of course to gravitate to the suggestion that was made by counsel for the Tan Sri Lim Group that an ordinary resolution which was passed to declare an event of default and/or for enforcement to be undertaken by the trustees should likewise be revocable by another ordinary resolution. But as contended by the trustee/banks that is just too simplistic an approach and ignores the rest of the clauses of the trust deed including but not limited to cll 14.3, 14.5, 22.1(c), 22.1(e) and 33.2 of the trust deed.

[119] I turn now to consider the higher valuation resolution which seeks to impose a 'higher valuation' for the charged properties. In this regard, it is clear that the fixing of the reserve prices in any foreclosure proceeding by the court or the land office would be done based on the 'market value' and the market value is not necessarily the 'highest value' (see s 257(d) of the National Land Code and *Ng Tiou Hong v Collector of Land Revenue, Gombak* [1984] 2 MLJ 35 at p 37; [1984] 1 CLJ Rep 289 at p 291). In this case, reserve prices for the charged lands had already been fixed by the courts and even in respect of those reserve prices, the auctions for the Express Hotel land was aborted on 17 October 2013, 23 January 2014, 7 May 2015 and 10 September 2015 because there were no bidders. Likewise, the auction for the Dynasty Hotel land was aborted on 6 October 2015 as there was no bidder. Hence, it would be quite illogical to fix a higher valuation and to push up the reserve price as that would further negate the possibility of enticing bidders to bid for these lands.

[120] I turn now to the asset disposal resolution. This resolution relates to disposal and/or sale of the charged lands via ordinary resolution. Quite obviously, this will take matters out of the hands of the trustees and place it entirely in the hands of those who can muster enough votes for ordinary resolution (more than 50%) but not a special resolution which requires 75% of the votes. It must be borne in mind that the trust deed, read as a whole, places the power and duty of enforcement solely in the hands of the trustee.

[121] As such, the asset disposal resolution will grossly usurp the powers and function of the trustee vis a vis enforcement and/or realisation of the charged lands.

[122] The banks have described the asset disposal resolution as 'insidious'. It

may be true. But I cannot say what plans are afoot on the side of the Tan Sri Lim Group. Be that as it may, the important question is whether a disposal of charged lands by way of private treaty may be undertaken via ordinary resolution. As I stated earlier, it is significant that *the plaintiff had themselves previously issued a letter dated 28 October 2014 to the trustees proposing that a special resolution be passed for sale of the Sepang Land via private treaty*. In my view, the plaintiff's said letter is a manifestation of an express acknowledgment that such disposal of assets must be undertaken via a special resolution.

[123] Thus, the plaintiff and by extension, the Tan Sri Lim Group are estopped from now contending that the proposed resolutions may be undertaken via ordinary resolution. Indeed, to accede to the Tan Sri Lim Group's suggestion that an ordinary resolution is sufficient would be to condone an act of approbation and reprobation on their part. In that sense, it was quite legitimate to examine the past conduct of the parties to determine how they interpreted the terms of the trust deed. Hence, if parties have by conduct given a particular meaning to a term to a contract, then estoppel would apply to preclude them from contending to the contrary.

[124] The main thrust of the OS is the argument by the Tan Sri Lim Group that the EOD resolution for enforcement action may be revoked by another ordinary resolution. As appealing as this may appear, the view I take is that such revocation, if passed would certainly trigger cl 17(d) and/or (e) of Schedule 3 of the trust deed as they abrogate/modify the rights of noteholders and abrogate/modify the provisions of the trust deed.

[125] The other argument by the Tan Sri Lim Group is that the trustee's insistence that the proposed resolutions (as per the OS) be done via special resolution would mean that the wishes of the Tan Sri Lim Group (holding 50.25% of the notes) will never prevail as they will not be able to muster 75% of the votes at any meeting of noteholders.

[126] In my view, the argument that was taken by the Tan Sri Lim Group is flawed as it ignores the fact that the rights entitlements and interests of the noteholders rank *pari passu* and each is no greater that the other. And merely because they collectively hold 50.25% of the notes, it does not equate to them having 'majority rights' such that they can decide via ordinary resolution all matters relating to enforcement or realisation of charged lands. Ultimately, it has to be accepted that the trustees were appointed because of the statutory requirement as per s 74(3) of the Companies Act 1965 read together with preamble D to the trust deed which states that the trustees are to act for the 'benefit of the holders'.

[127] This means the trustees are to act for all the noteholders and not just

to act in favour one side or the other. Indeed, any monies that are recovered or recouped will be distributed to all noteholders in proportion to the amount of notes held. The proposed resolutions will, for want a better word, scuttle all recovery/enforcement efforts by the trustees. That is the first point. The second point is that the proposed resolutions will certainly result in an abrogation or modification of the right/interests of the noteholders and substantially encroach upon and/or emasculate the powers/discretion of the trustees and will effectively relegate all such power/discretion in the hands of Tan Sri Lim Group holding 50.25% of the notes, which, depending on what their ultimate plan is, will or may result in no recovery and/or enforcement against GPB and/or its subsidiaries and/or against the charged lands.

[128] In my view, this is par excellence a modification or abrogation of the terms of the trust deed and rights of noteholders. As such, these can only be carried through special resolution and not by ordinary resolution. The last declaration that is sought by the Tan Sri Group is an omnibus one and appears to be intended to allow for an ordinary resolution for all matters falling outside of cl 17 of Schedule 3 of the trust deed. In my view, cl 17 of Schedule 3 cannot be read as being limited to only those matters as requiring a special resolution and situations could arise which may warrant a special resolution. And for this, the trustees have the requisite power under cl 22.1(c) of the trust deed to insist that all such matters be undertaken via special resolution.

[129] Clause 22.1(c) of the trust deed is an omnibus clause which empower the trustee to determine all 'questions and doubts arising in relation to any provision' of the trust deed. Here, the trustee has with sufficient and cogent reasons and explanation, determined that the proposed resolutions should be passed by way of special resolution. That determination is conclusive and binding on all noteholders. The complaint that the trustee's cannot have absolute and unfettered discretion is a non-starter. This is because the trust deed itself gives such vast powers to the trust deed, to decide as they think fit, whether a matter depending on its importance and impact on the rights and entitlement of Noteholders, ought be done via special resolution.

[130] Before I conclude, I should add that the views that I have articulated above and quite similar to the opinion of the court in Kuala Lumpur High Court Suit No 22NCC-163–06 of 2016 (*Maybank Investment Bank Berhad & Ors v Million Westlink Sdn Bhd & Anor* (now reported in the electronic journal as [2015] MLJU 2252; [2015] 1 LNS 1301; [2016] AMEJ 204) which is a decision of the Honourable Datuk Wong Kian Kheong JC dated 29 December 2015 where the learned judicial commissioner had occasion to deal with the same transactional documents and largely the same parties as in the OS.

[131] In that case one of the issues that the learned judicial commissioner

had to deal with was the trustee's insistence that a special resolution was required in order for a reply to be given to Bank Islam Malaysia Bhd who had around 20 October 2014 expressed an interest as prospective financier for a third party, who was interested to purchase the Express Hotel land.

[132] The second defendant in that action (eight defendant in the present OS) instructed the trustee to release the relevant information to BIMB so as to facilitate the sale of the Express Hotel land. But the trustee took the position that a majority of 75% of noteholders was needed to release the relevant information to BIMB. The learned judicial commissioner examined all the relevant provisions of the trust deed and concluded that the trustee was entitled to insist that there be a special resolution. This is what the learned judicial commissioner said in relation to that issue:

> 63. I am of the view that UTB's insistence on the need of a special resolution to be passed by 75% of RCSN's holders, is justified on the following grounds:
>
> (a) *according to cl 33.2 trust deed, only UTB may pursue the rights and remedies available under the law and the trust deed*. To respond to BIMB's inquiry (regarding the possibility of selling the Empress Hotel land by private treaty) is part of the exercise of UTB's rights and remedies within the meaning of cl 33.2 trust deed. Under cl 33.2 trust deed, any RCSN holder may only request UTB to exercise its rights and remedies by a 'special resolution ' which requires a 75% majority of RCSN's holders (please see para 2 (Schedule 3));
>
> (b) BIMB's inquiry concerns the possibility of selling the Empress Hotel land by private treaty. *If this sale by private treaty is successful, this will have the effect of*:
>
> (i) *modifying or compromising the rights of the RCSN holders within the meaning of para 9.1 (Schedule 1) and sub-para 17(d) (Schedule 3) which requires a special resolution to be passed by 75% majority* of RCSN's holders; and/or
>
> (ii) sanctioning the release of GPB from the payment of all or any part of the nominal value or face value owing under the RCSN whereby sub-para 17(c) (Schedule 3) requires a special resolution to be passed by 75% majority of RCSN's holders; and/or
>
> (c) if UTB does not obtain a special resolution before responding to BIMB's inquiry, UTB may be vulnerable to a claim that UTB has breached the above provisions in the trust deed.
>
> 64. *There is another reason why UTB's insistence on 75% Majority Requirement cannot be challenged by the second defendant. This is because of cl 22.1(c) trust deed* which provides as follows:
>
> Powers of Trustee
>
> 22.1 Powers of Trustee: The Trustee shall have all the powers conferred on

> trustees hereunder by the Trustee Act 1949, and by any general law and as the holder of [RCSN] and by way of supplement thereto it is expressly declared as follows:
>
> ...
>
> (c) Power of Determination: the Trustee shall as between itself and the Holders and all persons claiming under or through them have full power to determine all questions and doubts arising in relation to any of the provisions of these presents and every determination, whether made upon a question actually raised or implied in the acts or proceedings of the Trustees, shall be conclusive and binding on all such persons.'
>
> *By reason of cl 22.1(c) trust deed, UTB's insistence on a special resolution in respect of BIMB's Inquiry, 'shall be conclusive and binding' on the second defendant and 'all persons claiming under or through' the second defendant. As decided in Brett Andrew Macnamara, I should give effect to cl 22.1(c) trust deed*. (Emphasis added.)

[133] In the above case, the learned judicial commissioner was dealing with, inter alia, the issue of release of information to the intended financier and he concluded that the trustee was justified and/or empowered to insist that a special resolution was required. Under the OS before this court, the proposed resolutions are self evidently far extensive and I might add, far reaching and draconian vis a vis the rights of the noteholders and the fate of the charged lands. As such, I am fortified in my view that the trustee are equally, if not more entitled in the present circumstances to insist that the proposed resolutions be passed by way of special resolution.

[134] Ultimately, it is my view that the words appearing in the various clauses in the trust deed are clear and are unambiguous. There was no need for any disambiguation by utilising either the interpretive tool of an 'implied term' nor was there any basis for the contra proferentum rule.

THE OUTCOME

[135] In the circumstances and for the reasons as articulated above, the plaintiff's OS (encl 1) is dismissed with costs. The banks' counterclaim is allowed with costs.

[136] The plaintiff, seventh and eighth defendant are to jointly and severally pay to the trustee costs of RM70,000 (subject to 4% allocatur).

[137] The plaintiff, seventh and eighth defendants are to jointly and severally pay to the banks (total) costs of RM70,000 (subject to 4% allocatur).

Order accordingly.

OS dismissed and counterclaim allowed.

Reported by Ashok Kumar